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No. 83-2058

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GERALD E. SMALLWOOD,

Petitioner,

v.

UNITED AIR LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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THE RESPONDENT, UNITED AIR LINES, INC.* [HEREINAFTER "UNITED"] RESPECTFULLY PRAYS THAT THE PETITION FOR A WRIT OF CERTIORARI REQUESTED HEREIN BY GERALD E. SMALLWOOD [HEREINAFTER "SMALLWOOD"] BE DENIED.

STATEMENT OF THE CASE

We will set forth the factual and procedural background briefly. We urge this Court to rely upon the opinion of the Fourth Circuit for a fair, accurate and succinct statement of the facts.

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* United Air Lines, Inc. is a corporation, and its parent corporation is VAL, Inc. with offices at 1200 Algonquin Road, Elk Grove Village, Illinois 60666.

Factual Background

On August 22, 1977, a lawyer who had been trained as a pilot applied for a position as a pilot at United (Tr. Transcript, Sept. 20, 1982, p. 63). In his application, Smallwood stated *inter alia* that he was then employed by Overseas National Airways ["ONA"] and that he was 48 years old (Plaintiff's Ex. 1, 1st Trial). United rejected Smallwood's application pursuant to its long-standing policy—which it believed in good faith to be safety-based—that it would not hire any pilot over 35 at the time of his/her application.[1]

Because of Smallwood's failure to meet United's maximum age hire requirement, his application was not processed further (Tr. Transcript, Sept. 20, 1982, pp. 40-41). Thus, it was not until preparation for the initial trial that another basis for Smallwood's disqualification became known to United. At this time, it was learned that Smallwood had been fired by ONA for violations of its regulations, specifically the use of an air travel card for unauthorized transportation and fraudulent procurement of expenses for a move not actually accomplished (Tr. Transcript, Nov. 28, 1979, p. 103). After a hearing before a neutral arbitration panel, the charges were sustained but the penalty was changed from discharge to an 18-month suspension (Defendant's Ex. 1, 2nd Trial). None of those facts was disclosed on Smallwood's application to United.

Still another lawful basis for not hiring Smallwood came to light when, pursuant to the District Court's Order of October 20, 1982, to process his employment application (Pet. Am. App. 66-67), it was found that he just met United's minimum standards in an aircraft simulator, but did not meet its min-

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[1] Similar policies were not uncommon in the airline industry. *See, e.g., Murnane* v. *American Airlines*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

imum medical qualifications for hire as of 1978. United then advised Smallwood that he would not be hired.[2]

Procedural History

Smallwood's suit against United for age discrimination was first tried on November 28, 1979. At this first trial United sought to defend against the charge of an Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ["ADEA"], violation by asserting, first, that its rule under which it refused to process Smallwood's application met the requirements of a bona fide occupational qualification ["BFOQ"] within ADEA, and, second, that he would not have been hired as a pilot even if there had been no age discrimination. The district court judge, however, confined the trial to the validity of the BFOQ claim and refused to permit United to develop fully, or to rule, on its second defense (Pet. Am. App. 3).

The record establishes that, contrary to Petitioner's statement, United never abandoned its adamant denial that Smallwood was qualified for employment with United as a pilot. United attempted, albeit unsuccessfully, to develop a full record of Smallwood's lack of qualifications, including his incomplete disclosure on his United application and his premeditated fraud on his prior employer, Overseas National Airlines, and ONA's subsequent termination of his employment, later converted to an 18-month suspension by a neutral arbitration panel. As the Fourth Circuit noted:

> The district judge made it clear throughout the first trial in this case that he was considering only the violation issue. Thus, he repeatedly—ultimately, with considerable emphasis and finality—ruled that he would not permit the defndant to inquire either on cross-examination of the

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[2] This failure to meet medical qualifications was never litigated as the District Court denied United's Motion for Further Proceedings Necessitated by Compliance with the Court's Injunctive Order and supporting affidavit.

> plaintiff or by direct evidence fully into the circumstances of plaintiff's termination as a flight officer by his previous airline employer, Overseas National Airways (ONA). (Pet. Am. App. 22)

Additionally, to put the first trial in context, Smallwood sought only injunctive relief that United *process him for hire*, not that United hire him; he did not put in issue whether he was qualified for hire—physically, mentally or in terms of aeronautical skill. United never admitted Smallwood met those qualifications.

Second, United never stipulated, as Petitioner claims, to Smallwood's prima facie case of liability and damages. United did admit that it had a maximum age hire policy, and that it had refused to hire Smallwood under that policy. Apparently, on the basis of this admission, the District Court opened the first trial by *ruling* on the pleadings that Smallwood had established a prima facie case (Tr. Transcript, Nov. 28, 1979, pp. 3-4). The court made its ruling without hearing any evidence. Following this ruling, Smallwood's entire direct case "on damages" consisted of a series of stipulated numbers as to what his salary would have been, had he been hired. As soon as those numbers were admitted, the District Court held that the burden shifted to United to prove its claimed exemptions (Tr. Transcript, Nov. 28, 1979, p. 8). The Court did not make a finding nor does the record provide a basis for finding that Smallwood was "qualified" for hire. And, in fact, as the evidence shows, he was not.

Finally, Smallwood insists that at the second trial, held September 20, 1982, United "stipulated to Smallwood's evidence that he was still qualified for the job and to damage evidence" (Pet. Brief 3). What United stipulated to was plaintiff's counsel's statement that if Smallwood were to testify, he would state "he has a current medical certificate from the FAA" and that his "medical condition is the same now as it was

at the time, and that all of the other basic minimum qualifications are still the same, and, of course, are still met" (Tr. Transcript, Sept. 20, 1982, p. 10). Stipulating as to what Smallwood would testify is hardly stipulating to the conclusion that he was "still qualified."

ARGUMENT

The Petitioner does not state any legitimate special or important reason for this Court to exercise its discretion and grant certiorari to this already extensively litigated matter. Basically, the Petitioner, a lawyer-pilot who was initially denied employment by United on the basis of his age, but who would not have been hired anyway because of a fraud he perpetuated on his prior airline employer and because he was not medically qualified, contends that: (1) the courts below should not have allowed United to develop a full and complete record as to his qualifications or lack thereof as a pilot and (2) he is entitled to backpay make-whole damages under ADEA even though he never would have been hired by United absent any age discrimination. These complaints simply do not justify the grant of certiorari.

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN OPENING THE RECORD FOLLOWING REMAND TO RECEIVE FURTHER EVIDENCE ON ISSUES NOT RESOLVED AT THE FIRST TRIAL

This Court has held previously that "[a] motion to submit additional proof is addressed to [a trial judge's] sound discretion." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971). That discretion will be interfered with only where its abuse has been clearly shown. *Colage* v. *University of Tennessee,* 544 F.2d 297, 301 (6th Cir. 1976) (no abuse where, after case had been submitted, the court asked defendant to submit additional evidence). It has been noted that reversal will occur "only in a rare case." 6A Moore's Federal Practice, Paragraph 59.04 at 59-38 (1983).

Ignoring this prior holding and commonly accepted standard, Petitioner argues that this Court should review this case because district courts require guidance in determining when to take additional evidence on remand (Pet. Brief 5-8). Failing to

cite cases in conflict or even a single authority, Petitioner urges this Court to believe that the District Court below acted improperly in permitting the parties to develop a full record on remand. In doing so, however, Petitioner fails to indicate how he was prejudiced by a complete record. Additionally, contrary to Smallwood's assertion, United does not agree there is a lack of guidance on this issue (Pet. Brief 7). The discretion of the trial court in reopening the record is an accepted standard which simply does not require the attention of this Court.

It is clear from the record that, on remand, the District Court properly invoked this standard, issuing an order that it:

> exercises its discretion to allow the reopening of the record and receipt of evidence on the question whether plaintiff would have been hired by the defendant regardless of his age. (Pet. Am. App. 101).

In light of its rulings at the first trial prohibiting United to introduce evidence of the circumstances of Smallwood's discharge by ONA, this was not an abuse of discretion and permitted the Court to correct what may have been reversible evidentiary rulings.

The damaging evidence received at the second trial, which Smallwood so vehemently decries, is merely the decision of the ONA System Board of Adjustment, with the Opinion of the Neutral Referee, about which United's counsel had attempted to question Smallwood at the first trial (Defendant's Ex. 1, 2nd Trial). The Court also received the testimony of Melvin Volz, United Vice President—Flying and a member of the Pilot New Hire Review Board, concerning United's employment policies as they would have borne on processing Smallwood's application, supplementing the testimony of United Captain J. D. Smith offered at the first trial (Tr. Transcript, Sept. 20, 1982, pp. 11-56; Tr. Transcript, Nov. 28, 1979, pp. 111-160). This evidence was uncontradicted by Smallwood.

In conclusion, the three years since the District Court's initial decision, the increased significance of the question whether Smallwood would have been denied employment for reasons other than age, the absence of any indication by the District Court of its inclinations on that issue before the additional evidence was submitted, and the District Court's limitation on the presentation of this evidence at the first trial, all supported the Court's decision to reopen the record. The District Court did not abuse its discretion and this issue offers no compelling basis to grant certiorari.

II. BIFURCATION OF LIABILITY AND DAMAGES, COMMON IN EMPLOYMENT DISCRIMINATION CASES, IS ALSO PROPER IN ADEA CASES

As acknowledged by the Fourth Circuit, there are generally two issues in disparate treatment discrimination cases: (1) the substantive violation and (2) the remedy (Pet. Am. App. 11-19). These separate and distinct issues have long been recognized in Title VII and Section 1981 cases. *See, e.g., Teamsters* v. *United States*, 431 U.S. 324 (1977). There is absolutely no reason not to apply the same analysis to cases under ADEA, which was patterned on Title VII. *See, Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979).

In its opinion, the Fourth Circuit reviewed the history of bifurcation in this context, starting with *Mt. Healthy School Board of Education* v. *Doyle*, 429 U.S. 274, 285-87 (1977), and its specific application in the employment discrimination context, *Teamsters* v. *United States*, 431 U.S. 324, 326 (1977), and *East Texas Motor Freight* v. *Rodriguez*, 431 U.S. 395, 403-04, n. 9 (1977). In the latter case, this Court said:

> Even assuming, *arguendo*, that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event.

Thus, this Court has previously sanctioned a two-part analysis, or bifurcation, in employment discrimination litigation.

Following this Court's precedent, the Fourth Circuit has consistently recognized and followed the rule as stated in *Rodriguez*, the most recent illustration of which being *Patterson* v. *Greenwood School Dist. 50*, 696 F.2d 293, 295 (4th Cir. 1982), as have other circuits. *See, Murnane* v. *American Airlines, Inc.*, 482 F.Supp. 135 (D.D.C. 1978), *aff'd*, 667 F.2d 98 (D.C.Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); *Nanty* v. *Barrows*, 660 F.2d 1327, 1334 (9th Cir. 1981). Therefore, while there is no question that bifurcation is not required, neither is it improper in employment discrimination cases.

Nevertheless, in the face of this established authority, Smallwood asks the Court to grant certiorari on the basis of his flimsy argument that the "procedural contexts" of *Teamsters* and *Rodriguez* render their approval of bifurcation inapplicable to employment discrimination cases in general (Pet. Brief 8-11). Nothing in those decisions supports such an overly restrictive interpretation. Moreover, the Fourth Circuit is not alone in applying bifurcation in age cases. *Murnane, supra.*

Furthermore, the procedural history of the case at bar illustrates the logic of such an approach. While the District Court did not expressly bifurcate the instant litigation, its rulings had just that effect. The trial judge, refusing evidence on whether or not Smallwood would have been hired absent age discrimination, restricted his holding at the time of the first trial to a finding of no substantive violation because of a lawful BFOQ. When this decision was reversed, it was necessary for the Court to address the issue it did not decide, *i.e.*, whether United had established by the preponderance of the evidence that it would not have hired Smallwood absent age discrimination. The resolution of that issue required the full examination of Smallwood's termination as a flight officer by his former airline employer. This case is a classic example of

the need, as well as logic, of bifurcating employment discrimination trials. The procedure was highly appropriate and does not require this Court's scrutiny.

III. THE RECORD FULLY SUPPORTS THE FOURTH CIRCUIT'S REVERSAL OF THE DISTRICT COURT'S FINDING THAT UNITED DID NOT PROVE THAT IT WOULD NOT HAVE HIRED SMALLWOOD FOR REASONS OTHER THAN AGE

On remand, United had the burden of rebutting, by a preponderance of the evidence, a presumption that Smallwood was entitled to employment and backpay as a result of United's discrimination. *See Sledge* v. *J. P. Stevens & Co.*, 585 F.2d 625, 636 (4th Cir. 1976), *cert. denied*, 440 U.S. 981 (1979). United did so by presenting uncontradicted evidence that, in the absence of discrimination, it would not have hired Smallwood anyway.

However, without making specific findings of fact of its own or indicating disagreement with any of the factual findings set forth in the Report filed by the impartial arbitration Referee, the District Court held against United. As stated by the Fourth Circuit:

> The only clue to the district judge's rationale for his decision against the defendant's defense appears in three comments made by him in his oral opinion and his later clarification. No one of these comments relates to the actual facts and circumstances of the "alleged fraud" practiced by the plaintiff against his employer, ONA. The factual showing in the record of such misconduct by the plaintiff while in the employment of ONA seems to have been accepted by the district judge. The district judge's primary objection to the defendant's defense as based on these undisputed facts was that these facts and the conclusion they required represented an "after-the-fact rationale," because the facts had not been "available" to the defendant at the time the latter refused to process plain-

> tiff's application for employment. He declared that he had great doubt whether such "after-the-fact" evidence should be admitted but if "admissible" it was the duty of the court to view it with skepticism. It seems, also, that the district judge felt that the defendant should have, before refusing to process the plaintiff's application, offered the plaintiff an opportunity to give his side of his difficulty with ONA. (Pet. Am. App. 40-41; *see* Pet. Am. App. 83).

The trial court gave no support for these propositions; in fact, the authority is to the contrary. *Mt. Healthy School Board of Education* v. *Doyle*, 429 U.S. 274, 287 (1977); *Patterson* v. *School District 50*, 696 F.2d 293, 296 (4th Cir. 1982); *Gibson* v. *Mohawk Rubber Co.*, 695 F.2d 1093, 1097 (8th Cir. 1982); *Murnane* v. *American Airlines, Inc.*, 667 F.2d 93 (D.C.Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); *Rodriguez* v. *Taylor*, 569 F.2d 1231, 1240-41 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). The Fourth Circuit, on the basis of the record evidence, properly reversed this erroneous finding.

The undisputed testimony of United witnesses J. D. Smith and Melvin E. Volz, together with the documentary evidence contained in Defendant's Exhibits 1-7, conclusively proved that United had, at the time of Smallwood's application, established policies of rejecting applicants who had an employment history of acting dishonestly with a prior employer, or who misrepresented their history on United's application form; it also proved that this policy has been consistently applied. Petitioner asserts that the District Court heard the testimony of Volz and Smallwood, weighed their credibility and found Smallwood more convincing than Volz (Pet. Brief 14-15). No such thing occurred. Smallwood (Tr. Transcript, Sept. 20, 1982, pp. 57-74) and Volz (Tr. Transcript, Sept. 20, 1982, pp. 11-56) did not testify about the same events, and did not contradict each other; there was, accordingly, no occasion for the court to "weigh their credibility" and determine who was more convincing.

Furthermore, even if it were a legitimate fact-finding posture, the District Court had no cause to be skeptical of United's "after-the-fact" evidence. Courts may reasonably be skeptical when new employment policies emerge after discriminatory employment decisions have been made. But the policies involved here were well-established when Smallwood applied for hire—indeed, they are obvious. As to the weight of "after-the-fact" rationalizations, the District Court did not express any doubts whether United would, in fact, have certainly uncovered the fact of Smallwood's discharge by ONA simply by processing his application, or whether United would have investigated the matter as relevant to his employability. On the contrary, the District Court expressly found that United *would* have considered whether the underlying reasons for Smallwood's discharge affected its own employment decision.

The District Court's final reason for finding against United was that Smallwood was not allowed the opportunity of giving "his side of the story.[3] As noted by the Court of Appeals, such consideration is misplaced (Pet. Am. App. 48-49). Petitioner was given such an opportunity not only in his lengthy arbitration hearing but also at both trials.

It is obvious from Petitioner's Brief that, while arguing that the Fourth Circuit "went out of its way to construe the record in such a manner as to ignore totally the evidence that supported the District Court's decision for Smallwood" (Pet. Brief 11-12), Petitioner does not deny that, in fact, he defrauded his prior employer and did not fully disclose his employment status with ONA on his application to United. The Fourth Circuit's

[3] The evidence was that United, on receiving reports of prior misconduct against a former employer, did *not* invariably ask the applicant for his "side"—indeed, it sometimes rejected the application without telling the employee the reasons, to protect its sources of information—and it is highly doubtful that United would have asked Smallwood to tell his "side" (Volz Testimony, Tr. Transcript, Sept. 20, 1982, pp. 22-23).

recitation of the facts concerning Petitioner's fraudulent activities is true and not distorted (Pet. Am. App. 27-39).

In conclusion, the Fourth Circuit had ample grounds for finding:

> It is thus clear that, so far as any of the reasons assigned even obliquely by the district court as a basis for dismissing the defendant's defense, they cannot justify a dismissal of the defendant's defense. Moreover, the facts in support of the defense [the grounds for plaintiff's discharge by ONA] are fully detailed in the record and completely justified the defendant's action. Under these circumstances, the district court's conclusion dismissing this defense based on the reasoning stated by such court, is clearly erroneous. (Pet. Am. App. 50-51).

It is not necessary for this Court to grant certiorari to review this well-reasoned opinion supported totally by the record evidence.

IV. SMALLWOOD, WHO NEVER WOULD HAVE BEEN HIRED EVEN ABSENT DISCRIMINATION, IS NOT ENTITLED TO BACKPAY

Petitioner contends that, even though he would not have been hired anyway based on facts existing at the time he filed his application for employment with United and facts which would have been developed in a reasonable processing of such application, he nonetheless is entitled to backpay from the date of discrimination through the second trial. The Fourth Circuit properly found this position to be untenable (Pet. Am. App. 58-62).

The purpose of ADEA is to make persons whole for injuries suffered as a result of unlawful discrimination. The Act provides legal and equitable remedies to eliminate the unlawful practices and to restore the aggrieved person to the position he would have been in had the illegal discrimination not occurred. 29 U.S.C. § 626. Consistent with this purpose of recreating the

circumstances that would have existed in the absence of illegal age discrimination, the general rule is that aggrieved persons are not entitled to recover damages if they would not have been hired anyway. *See, e.g., Gibson* v. *Mohawk Rubber Co.*, 695 F.2d 1093, 1097 (8th Cir. 1982); *Houghton* v. *McDonnell Douglas Corp.*, 627 F.2d 858, 863-66 (8th Cir. 1980).

Smallwood argues otherwise, relying, albeit mistakenly, solely upon *Rodriguez* v. *Taylor*, 569 F.2d 1231 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913 (1978), and *Houghton*. Neither of those cases bears the weight Smallwood puts on them. The Fourth Circuit handily distinguished them from Smallwood's situation (Pet. Am. App. 60-64, n. 14).

To summarize the basic differences, the plaintiff in *Rodriguez* demonstrated at trial that he had the physical and mental capabilities necessary for the job of security guard for the City of Philadelphia, whereas in *Smallwood* there is no finding whatever on qualifications. Additionally, after Rodriguez had established a prima facie case, the defendant failed to offer any evidence that Rodriguez was in any way unqualified, thus never proving that Rodriguez would not have been hired because he could not pass the required Civil Service exam. United adduced clear proof at trial why it would never have hired Smallwood.[4]

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[4] The Third Circuit in *Rodriguez* also acknowledged that administration of a standardized examination to a single candidate would not have been costly to the employer nor would it have unduly complicated its hiring process. 569 F. 2d at 1241, n. 17a. Such is not the case herein. At any given time, United has on file between 13,000 and 16,000 active applicants for pilot positions. The hiring process is a complex and costly three-step review: 1) scrutiny of application information and preference ranking on basis of qualifications; 2) interview, aeronautical evaluation, preliminary physical examination and previous employment verifications; and 3) psychological test, aircraft simulator evaluation and thorough physical examination (Tr. Transcript, Nov. 28, 1979, pp. 116-119).

The plaintiff in *Houghton* was awarded backpay from the date he was terminated as a test pilot on grounds of age to the last date on which he had, by prior trial and appeal, affirmatively proved (through a medical examination on the ending date) that he *was* physicially qualified. Smallwood never established physical qualifications.

Under the circumstances of this case Smallwood, like the plaintiffs in *Murnane, Patterson* and *Gibson,* is not entitled to backpay. The purpose of a backpay award is to make the plaintiff whole, *i.e.,* to restore him to the position he would have occupied but for the discrimination. Smallwood, who was not physically qualified and who had lied to and cheated his previous employer, would never have been hired by United as a pilot. Therefore, any award would be an undeserved and improper windfall.

V. TRUTHFULNESS, RELIABILITY AND HONESTY ARE JOB-RELATED CRITERIA FOR PILOTS AND CAN BE LAWFULLY CONSIDERED IN EVALUATING APPLICANTS

In the face of the record in this case, Petitioner actually tells the Court that honesty and integrity are subjective criteria which are not job-related (Pet. Brief 22-25). As the Fourth Circuit characterized his argument:

> What the plaintiff contends is that trustworthiness, reliability and honesty are in no way required or expected of a pilot of a large commercial plane, to whose substantially unsupervised competency, trustworthiness, reliability, and fidelity to the rules and regulations is committed the safety of the scores of passengers on the plane he pilots. (Pet. Am. App. 53).

The Court of Appeals rightfully refused to accept that argument, stating:

> The logs a pilot maintains, the accuracy of his reports, the faithful and exacting observance of all the safety rules and regulations and their accurate and punctual recording, all

> are vital to the safety of the plane's passengers and all depend on the trustworthiness, truthfulness and reliability of that pilot aloft, where he operates largely free from any effective supervision. Any argument that the only qualification of such a flight officer is his mechanical ability to manipulate the various controls of the plane completely lacks conviction. And the evidence in this record demonstrates the necessity for these additional qualifications of trustworthiness and reliability. (Pet. Am. App. 53-54).

Not only United's witnesses but also the impartial arbitration referee confirmed this essential qualification of honesty for a pilot of a commercial airline.

No more need be said. Petitioner's argument is, at best, baseless, and, at worst, disingenuous.

CONCLUSION

For the reasons stated, this Court should deny the Petition for a Writ of Certiorari.

Dated: June 28, 1984

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